AVNET PARTNER SOLUTIONS (M) SDN BHD A

v.

WI-NET TELECOMS SDN BHD & ANOR; LEE WAI TUCK (THIRD PARTY)

B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI J
[SUIT NO: D-22NCC-572-2011]
29 OCTOBER 2012

C

CIVIL PROCEDURE: *Third party proceedings - Breach of fiduciary duties - Liability of third party as former director of defendants - Goods sold and delivered and services rendered - Whether third party purchased goods with exorbitant price - Whether purchase to enrich plaintiff and third party - Whether third party acted without authority of defendants* D

CIVIL PROCEDURE: *No case to answer - Election - Whether submission of no case to answer made - Whether court put election on third party to call for evidence - Whether amounted to no case to answer against defendants' claim - Whether adverse inference invoked for failure to adduce evidence - Evidence Act 1950, s. 114(g)* E

EVIDENCE: *Witness - Cross-examination of defence witness - Defence witness not made available for continued cross-examination by plaintiff and third party - Whether cogent reasons provided for failure to call witness - Whether adverse inference could be invoked - Evidence Act 1950, s. 114(g)* F

The plaintiff claimed against the first defendant for balance sum owed for goods sold and delivered and services rendered, and against the second defendant as the guarantor. The defendants G denied that they were indebted to the plaintiff and commenced third party proceedings against the third party who was the former director of both the defendants on the grounds that the third party had conspired with the plaintiff to cheat the first defendant in the sale and purchase of computers to unjustly enrich the H plaintiff and himself. The defendants contended that the third party had approved the purchase of the computers with exorbitant prices without obtaining the approval of the board of directors of the first defendant by way of resolution and that the third party had given a guarantee in the name of the second I

defendant in favour of the plaintiff without the authority or approval of the board of directors of the second defendant. The defendants also claimed that the third party was in breach of his fiduciary duties to the defendants when the third party acted with the plaintiff with the intention to wind up the first defendant. The third party averred that the transactions and dealings in the purchase of the computers were done with the knowledge and consent of the defendants and that he never conspired with the plaintiff to defraud the first defendant or to unjustly enrich himself but instead, had a legitimate interest to develop the defendants into profitable companies. DW1 was called to testify for the defendant on the business plan and project undertaken by the first defendant when the third party was the Chief Executive Officer. DW1 had prepared a report that stated that the procurement of equipment and peripherals was a waste of money as the overall system price was higher than the market price and that services was billed but never rendered. The defendants also called DW2 to give evidence. However, during the continued cross-examination of DW2 by the plaintiff, DW2 cited health conditions which caused several postponements and eventually to the discontinuance of the cross-examination of DW2 by the plaintiff and the third party. Counsel for the defendant then proceeded to close its case without completing the case for the defendants. The court proceeded to enter judgment for the plaintiff as counsel for the defendants had tacitly agreed and informed the court that the plaintiff could enter judgment against the defendants as the defendants did not continue with their defence. The defendants maintained the claim against the third party but proceeded to close their case without completing the case against the third party. The third party did not call any witness to support his case including himself and contended that a submission of no case to answer was not made and was not put to election by the court on whether to call for evidence.

Held (dismissing defendants' claim against third party with costs):

(1) Since DW2 was not made available for continued cross-examination, the third party did not have the opportunity to exercise his right to cross-examine DW2. Further, since DW2, being the main witness for the defendants, chose not to continue with her evidence on behalf of the defendants, it was tantamount to the defendants abandoning their claim against the third party. (para 19)

(2) The court invoked the provisions of s. 114(g) of the Evidence Act 1950 against DW2 on the grounds that there was no credible or cogent medical evidence to show that DW2 was incapable of giving further evidence except the statement from the Bar that DW2 not be subjected to "the stress and pressure of cross-examination". No evidence affecting a party was admissible against that party unless the latter had an opportunity of testing its truthfulness by cross-examination. Thus, the written witness statement and the oral evidence of DW2 given in court thus far was inadmissible as evidence against the third party and was therefore, expunged. (paras 21 & 22)

(3) DW1 was not a witness of fact but gave evidence as an expert on the viability of the defendants' project. His expertise was not on the aspect of telecommunications. In addition, DW1 could not give any factual evidence on the relationship between the defendants specially that of DW2, the third party and evidence as to how the contract between the plaintiff and the defendants was arrived at and performed. Thus, DW1 was not in a position to testify on behalf of the defendants on whether the third party had conspired with the plaintiff to cheat the first defendant in order to enrich the plaintiff and himself, the purported requirements for the necessary resolutions and importantly, on whether the third party was in breach of his fiduciary duties owed to the defendants. Anything said by DW1 not within his expertise would be hearsay and inadmissible. (paras 24, 26 & 28)

(4) The third party proceedings may be dismissed for want of prosecution independently of the action between the plaintiff and the defendant. The defendants had effectively allowed the plaintiff to enter judgment when they decided to close their case. However, while maintaining their case against the third party, the defendants refused for DW2 to be cross-examined. This conduct tainted the defendants' third party proceedings with *mala fides* and hence, was a proper case for the court to strike out the third party claim. (para 32)

(5) The defendants had not proven or established a case against the third party on a balance of probabilities. Where the defendants had not proven their case, there could be no case

for the third party to answer. The defendants had failed to produce any evidence whatsoever to establish conspiracy, breach of fiduciary duties and intention to wind up the first defendant as pleaded by the defendants. (para 33)

(6) It was not a correct exercise of discretion to invoke an adverse inference under s. 114(g) of the Evidence Act 1950 against the third party for failing to adduce evidence through witnesses including the third party himself in view of the fact that there was no case for the third party to answer. With the rejection of the evidence of DW2 as being inadmissible and with no weight being attached to the evidence of DW1 and DW3, the defendants failed to establish a case against the third party. Therefore, there was no shifting of the evidentiary burden on the third party for him to discharge. (para 43)

Case(s) referred to:

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***

Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan [2007] 6 CLJ 192 CA ***(refd)***

Sanatan Daw v. Dasarathi Tah AIR 1959 Cal 677 ***(refd)***

Slade & Kempton (Jewellery) Ltd v. Kayman Ltd [1969] 3 All ER 786 ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(dist)***

Vathemurthy Arumugam v. RS Thanenthiran Raman Kutty [2011] 1 LNS 1374 HC ***(refd)***

Wisniewski v. Central Manchester Health Authority [1998] PIQR 324 ***(refd)***

Yoong Sze Fatt v. Pengkalan Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(dist)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Rules of the High Court 1980, O. 16 r. 1

Evidence Act 1872 [Ind], s. 137

Other source(s) referred to:

Sarkar on Evidence, 15th edn, Reprint 2001, pp 2169 & 2170

For the plaintiff - Christopher Arun (Johnson Lim Fung Tat with him); M/s Zaid Ibrahim & Co

For the defendants - Patrick Dass; M/s Patrick Dass & Co

For the third party - Balraj Singh Sidhu; M/s Balraj Singh & Co

Reported by Sandra Gabriel

JUDGMENT

Mah Weng Kwai J:

Background Facts

[1] By its statement of claim dated 31 March 2011 the plaintiff claimed the sum of RM3,183,556.16 together with interest and costs against the first defendant being the balance sum owing for goods sold and delivered and services rendered and against the second defendant as a guarantor for the indebtedness of the first defendant.

[2] The defendants denied they were indebted to the plaintiff and in turn commenced third party proceedings against the third party, a former director and shareholder of both the defendants. The defendants claimed against the third party for damages, contribution or indemnity of the whole amount claimed by the plaintiff on the grounds *inter alia*, that the third party had conspired with the plaintiff to cheat the first defendant in the sale and purchase of the computers on the price, quality and services related thereto to unjustly enrich the plaintiff and himself; that the third party had approved the purchase of the computers from the plaintiff at exorbitant prices without first obtaining the approval of the board of directors of the first defendant by way of a resolution and that the third party had given a guarantee in the name of the second defendant in favour of the plaintiff without the authority or approval of the board of directors of the second defendant. The defendants also claimed that the third party was in breach of his fiduciary duties to the defendants and that the third party acting in concert with the plaintiff had bad intentions to wind up the first defendant.

[3] The third party denied all of the defendants' allegations in his defence to the third party notice. In essence, the third party averred that the defendants' claim for contribution or indemnity against him was "totally baseless, wrong, unsubstantiated and devoid of any merits". The third party pleaded that at all material times it was agreed that he would be responsible for all transactions and dealings in the purchase of the computers and matters related thereto with the full knowledge and consent of the defendants. The third party as a shareholder of the first defendant and of a company known as Vision World International Sdn Bhd which owns the entire share holding of the second defendant, had

carried out his duties with full disclosure in the best interests of the defendants. The third party averred that he had never conspired with the plaintiff to defraud the first defendant or to unjustly enrich himself but instead had a legitimate interest to develop the defendants into profitable companies.

[4] The plaintiff after calling five witnesses closed its case on 21 February 2012.

[5] On opening the case for the defendants, counsel for the defendants called one Anil Chet Karamsingh as DW1 to give evidence as an expert on the business plan and project undertaken by the first defendant when the third party was the Chief Executive Officer. DW1 was not a witness of fact. DW1 had prepared a report and purported to say in his report that "the plan was never an approved or ratified part of an integrated go to market strategy"; that the plan was flawed as it did not take into consideration competitive market forces; that the procurement of equipment and peripherals were a waste of money as the overall system price was higher than the market price and that services were billed but never rendered.

[6] Counsel for the defendants then called Madam Kong See Kuan (DW2) the Managing Director to give evidence on behalf of the defendants. During the continued cross-examination of DW2 by counsel for the plaintiff on 29 May 2012, DW2 informed the court that she felt unwell and asked to be excused from continuing with her evidence. The hearing was adjourned and the case was fixed for continued hearing on 28 June 2012. When the trial resumed on 28 June 2012 the court was informed by counsel for the defendants that DW2 was absent as she was on medical leave for 14 days having been admitted into hospital on 26 June 2012. Counsel tendered a medical certificate dated 26 June 2012 to court which stated in brief the medical condition of DW2.

[7] The court noted the following circumstances arising from the absence of DW2 and from the contents of the medical certificate:

(i) the report was signed by one Dr Daniel KC Lee a Consultant Respiratory Physician although the court was informed previously that DW2 had suffered a stroke;

(ii) the court was not informed whether DW2 was mentally or physically impaired/unfit or both; and

(iii) the doctor did not state how long DW2 would be incapacitated or unwell and therefore would not be able to attend court after the 14 days medical leave. A

[8] The case was then postponed to 19 July 2012 and then to 6 August 2012 for continued hearing. On 6 August 2012 counsel for the defendants informed the court that DW2 was still hospitalised and proposed that the continued cross-examination of DW2 be conducted through written questions and answers. Counsel for the plaintiff and the third party not surprisingly objected to this request. Counsel for the defendants was advised to file a formal application to be supported by affidavit evidence. B C

[9] The application was heard on 27 August 2012. In the face of objections and in the absence of an affidavit affirmed by DW2 herself and the provision of law enabling the defendants to make such an application in the first instance, the application was dismissed. D

[10] In light of the difficulties faced by the defendants, the court informed counsel for the defendants that the court was prepared to adjourn to the hospital to record the evidence of DW2 if necessary. However there was no response to this proposal. E

[11] On 5 October 2012 parties requested to meet in chambers. While in chambers counsel for the defendants informed the court that he would not be calling DW2 although present in court, for continued cross-examination by counsel for the plaintiff and cross-examination by counsel for the third party by reason of her poor health. Counsel for the defendants then proceeded to close his case immediately without completing the case for the defendants. F

[12] Upon the close of the defence case and in the absence of any submissions by counsel for the plaintiff and the defendants respectively, the court proceeded to enter judgment for the plaintiff. This was because, although it was not a consent order, counsel for the defendants had tacitly agreed and informed the court that the plaintiff could enter judgment against the defendants as the defendants were not continuing with their defence. G H

[13] As for the third party claim, while counsel for the defendants informed the court that he was maintaining the case against the third party, he nonetheless proceeded to close the defendants' case without completing the case against the third party. In turn, I

counsel for the third party then informed the court that he would not be calling any witnesses in support of the third party's case including the third party himself. Counsel for the third party contended that he did not make a submission of no case to answer and was not put to election by the court on whether to call for evidence.

[14] In view of the turn of events, the court treated the whole trial at an end and called upon the counsel for the defendants and for the third party to file their respective written submissions.

Decision Of The Court

[15] Having read the submissions of counsel aforesaid and having considered all the evidence of the witnesses adduced thus far and the law applicable in this case, the court on 29 October 2012 dismissed the defendants' third party claim.

[16] Being dissatisfied with the decision the defendants now appeal against the whole of the said decision.

[17] The grounds of decision are as follows:

[18] A third party action is essentially an independent proceeding between the defendant as plaintiff and the third party as the defendant (O. 16 r. 1 RHC 1980).

[19] The case for the defendants was closed before completion. DW2 was partially cross-examined by counsel for the plaintiff but had not been cross-examined by counsel for the third party at all. The third party did not have the opportunity to exercise his right to cross-examine DW2. The court is of the view that when DW2 being the main witness for the defendants chose not to continue with her evidence on behalf of the defendants, although she was present in court on 5 October 2012, this was tantamount to the defendants abandoning their claim against the third party.

Evidence Of DW2

[20] For the time that DW2 was in the witness box, she gave evidence *inter alia* to the following effect:

(i) that the third party had conspired with the plaintiff to cheat the first defendant;

(ii) that the third party gave the guarantee purportedly for the second defendant without the knowledge and approval of the second defendant;

(iii) that the blank cheques signed by DW2 were for use in administration purposes only when she was away from the office and

(iv) that the payment vouchers were forgeries.

[21] *Sarkar on Evidence*, 15th edn. Reprint 2001, p. 2169 and *Halsbury's* 3rd edn. vol. 15 para. 800 both reiterate the trite principle that no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination. The right to cross-examine is not enough as there must be an opportunity to exercise that right. On the other hand, if the adverse party had the opportunity to cross-examine but chose not to do so, the case is then the same in effect as if he had cross-examined. *Sarkar* in p. 2170 states that evidence is admissible if cross-examination is not evaded or deliberately prevented.

[22] In the present case, DW2 elected not to continue with her evidence. This raises the presumption that she was evading or deliberately preventing her cross-examination. This is especially so since she was present in court on 5 October 2012 and there was no credible or cogent medical evidence on record to show that DW2 was unable or incapable of giving further evidence. All that was informed in chambers by counsel for the defendants was that he did not want to subject his client to "the stress and pressures of cross-examination". With respect, that was a statement from the bar and was not founded on medical evidence. It was not evidence that DW2 could not continue with her evidence based on medical grounds. The court was not prepared to accept the medical certificate procured some three and half months earlier as evidence *per se* that DW2 was in no position to continue with her evidence at all. In the circumstances, the court had no alternative but to conclude and invoke the provisions of s. 114(g) of the Evidence Act 1950 against DW2 for failing to continue with her evidence. The court also held that the written witness statement and the oral evidence of DW2 given in court thus far would be inadmissible as evidence against the third party and would

A therefore be expunged. There was simply no evidence adduced in court to show that DW2 was impaired physically or mentally or both and was rendered unfit to continue giving her evidence in cross-examination.

B **[23]** In *CD Field's Law Relating to Witnesses* 3rd edn. 2012, commentary on s. 137 of the Indian Evidence Act 1872 it is stated that the evidence given in examination-in-chief by a person who could not be produced for cross-examination cannot be made use of. (See *Sanatan Daw v. Dasarathi Tah* AIR 1959 Cal. 677 @ C 678).

Evidence Of DW1

[24] Counsel for the defendants called DW1 not as a witness of fact but as an expert. Counsel had prepared a written witness D statement for DW1 and with it was annexed a final report on the first defendant dated 20 June 2011 prepared by DW1. Counsel for the plaintiff and the third party objected to the inclusion of the report as evidence and applied for it to be expunged from the witness statement. Upon hearing the submissions of counsel E aforesaid, the court allowed the objection by counsel for the plaintiff and third party and expunged the report from the witness statement. The reasons for upholding the objection are *inter alia*, as follows:

F (i) The report was not included in any of the defendants' bundle of documents but was surreptitiously included as an annexure to the witness statement;

(ii) The action was filed in March 2011 and up to trial, the G defendants had failed to comply with directions given during case management on the filing of documents in the bundle of documents in parts A, B and C;

(iii) The report is dated 20 June 2011 and the defendants were attempting to introduce the report only on 23 March 2012 H with the trial have proceeded on four days to wit, on 27 December 2011, 20 February 2012, 21 February 2012 and 3 March 2012;

(iv) The defendants were attempting to introduce the report at the I 11 hour and after the plaintiff had closed its case;

(v) No valid reason was forthcoming from counsel for the defendants as to why there was such an inordinate delay in tendering the report and

(vi) As all the plaintiff's witnesses had been called and released there was no opportunity for counsel for the plaintiff to refer the report to them for their consideration and response.

[25] The court agreed with counsel for the plaintiff and third party that the attempt to include the report was a tactical manoeuvre on the part of the defendants. The prejudice caused cannot be compensated by costs and in the event the plaintiff and third party applied for time to file reports in reply, this would cause unreasonable delay to the trial.

[26] DW1 gave evidence as an expert. However, the court noted that his expertise was more in the areas of marketing and consultancy in distribution, channel sales development and product positioning and sales strategy rather than on technical aspects of telecommunications. Be that as it may, DW1 was allowed to give his opinion on the viability of the defendants' project. DW1 in his own words said he "did a review of the defendants' business plan or lack thereof and viability of whether or not the technology assets of the companies could be used".

[27] The court agrees with counsel for the third party that the evidence of DW1 can be evaluated and summed up briefly as follows:

(i) That his appointment was not to investigate the conduct between the plaintiff and the third party. His scope of appointment was to come up with a business plan to move the business of the first defendant forward and to turn around the company;

(ii) He was never requested by the first defendant to do any investigation on any alleged fraud committed by the third party;

(iii) That the first defendant had deployed the wireless hotspots pursuant to the broadband project with all the computer goods as sold and delivered by the plaintiffs;

A (iv) That the broadband project initiated by the third party actually took off; and

(v) His evidence on the over pricing of the computer goods and training was merely his view without making any market
B comparisons whatsoever.

[28] Given that DW1 was not in a position to give any factual evidence on the relationship between the defendants, especially that of DW2, and the third party and evidence as to how the
C contract between the plaintiff and the defendants was arrived at and performed, whatever was said by DW1 did not help the defendants to establish a case on a balance of probabilities against the third party. In particular DW1 was in no position to testify on behalf of the defendants on whether the third party had
D conspired with the plaintiff to cheat the first defendant in order to enrich the plaintiff and himself; on the purported requirement for the necessary resolutions and importantly on whether the third party was in breach of his fiduciary duties owed to the defendants. Anything said by DW1 not within his expertise would
E be hearsay and inadmissible.

Evidence Of DW3

[29] Similarly, Ms Tan Peng Hong (DW3), the company secretary, did not add any value to the evidence of the defendants
F against the third party at all. DW3 could not even answer a question by the court as to whether there was any provision in the memorandum of association and articles of association of the first defendant for a resolution to be passed by its board of directors to purchase items above a certain value. Similarly, DW3
G was uncertain as to whether there was any provision in the memorandum of association and articles of association of the first defendant for a shareholder's resolution to be passed to purchase items above a certain amount.

H **[30]** The sum total of the position was that the defendants failed to discharge its evidentiary burden of proving their case against the third party.

I

[31] The defendants had in effect abandoned their pleaded case against the third party. The defendants' case failed for want of prosecution when the most material witness (DW2) failed to present herself for cross-examination by the third party. Cross-examination of witnesses is classified as one of the fundamental rules of procedural fairness. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case. (see *Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan* [2007] 6 CLJ 192). For example, the allegation that the payment vouchers (bundle B pp. 86 to 88) said to be forged was not tested by cross-examination of the third party and must be taken as being abandoned by the defendants.

[32] Third party proceedings may be dismissed for want of prosecution independently of the action between the plaintiff and the defendant. (see *Slade & Kempton (Jewellery) Ltd v. Kayman Ltd* [1969] 3 All ER 786). The defendants had effectively allowed the plaintiff to enter judgment when they decided to close their case at that point in time. Yet while maintaining their case against the third party the defendants refused to allow DW2 to be cross-examined. This conduct taints the defendants' third party proceedings with *mala fides* and would be a proper case for the court to strike out the third party claim.

[33] In the circumstances, the court was of the view that the defendants had not proven or established a case against the third party on a balance of probabilities. Where the defendants have not proved their case, there can be no case for the third party to answer. The defendants have failed to produce any evidence whatsoever to establish conspiracy, breach of fiduciary duties and intention to wind up the first defendant as pleaded by the defendants.

[34] In the case of *Vathemurthy Arumugam v. RS Thanenthiran Raman Kutty* [2011] 1 LNS 1374, Varghese George Varughese JC (as His Lordship then was) held that where there was no evidence before the court to support the plaintiff's cause of action in the first place, there was nothing to be assumed to be true and in favour of the plaintiff. The learned judge went on to say that

A the contention of the plaintiff (apparently on the authority of the Supreme Court decision in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 that the plaintiff was entitled to judgment as the defendant had opted not to call evidence was totally misconceived in law and on the facts.

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[35] Although counsel for the third party submitted that the third party did not make a submission of no case to answer and was not put to election by the court on whether to call for evidence, but in essence and in law, that was what the third party did. The C third party decided not to give any evidence. This amounted to electing not to answer the defendants' case.

[36] Usually, where a defendant has completed his case and if the third party elects not to answer the case, judgment will be entered for the defendant as the third party will be deemed to have D admitted the defendant's case as true. The court is mindful of the decision of the Court of Appeal in the case of *Yoong Sze Fatt v. Pengkalan Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 wherein it was held that once the defendant in civil proceedings makes a submission of no case to answer and elects not to call E evidence, then all the evidence led by the plaintiff must be presumed to be correct.

[37] However, *Yoong Sze Fatt* can be distinguished from our present case. In the former case, the plaintiff had completed his F case at the close of the plaintiff's case and the defendant elected no case to answer whereas in the present case the defendants had closed their case prematurely and without completing their case with DW2 evading or preventing herself from being cross-examined. Without the defendants completing their case, it will be G legally incorrect to presume that all the evidence led by the defendants must be presumed to be correct. In *Yoong Sze Fatt*, the defendant chose not to cross-examine the plaintiff's witness despite the presence of an opportunity to do so. (See also *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* H [2008] 2 CLJ 369 CA which followed the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor (supra)*.

[38] In *Jaafar Shaari*, His Lordship Peh Swee Chin FCJ observed that where "the respondents had chosen to close the case at the I end of the appellants' case and although they were entitled to do so, they would be in peril of not having the evidence of their most

important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it". Likewise in this case when the defendants chose to close their case without calling upon DW2 to complete her evidence, the defendants ran the peril of an adverse inference being drawn against them.

[39] Similarly, in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, Gopal Sri Ram FCJ when delivering the judgment of the Federal Court held that where a party to an action provides no reasons as to why he did not care to give evidence the court will normally draw an adverse inference against the party.

[40] Counsel for the defendants relied on *Takako Sakao* in support of his contention that where a party (the third party in our case) being fully conversant with the facts studiously refrained from giving evidence, the evidence given by the appellant (the defendants herein) ought to have been presumed to be true.

[41] Again, with respect, the case of *Takako Sakao* can be easily distinguished and cannot be applied to the present case. This is because when DW2 did not avail herself for further cross-examination and upon the close of the defendants' case, the evidence of DW2 was rejected by the court and there being no probative value in the evidence of DW1 and DW3, there was no case to be answered by the third party.

[42] And in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the English Court of Appeal held that before a court is entitled to draw an adverse inference from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action (the third party in this case) there must be a case to answer on that issue first before the court is entitled to draw the desired inference. Pared down to its minimum and at the expense of repetition, the court is of the view that the third party had no case to answer when the defendants had failed to prove their case.

[43] The court is also of the view that it will not be a correct exercise of discretion to invoke an adverse inference under s. 114(g) of the Evidence Act 1950 against the third party for failing to adduce any evidence through witnesses including the

A third party himself in view of the fact that there was no case for the third party to answer. With the rejection of the evidence of DW2 as being inadmissible and with no weight being attached to the evidence of DW1 and DW3, the defendants had failed to establish a case against the third party. There was no shifting of
B the evidentiary burden on to the third party for him to discharge.

[44] Considering the pleaded cases of the defendants and the third party respectively the court was of the considered view that the defendants had failed to prove their case on a balance of
C probabilities that the third party had conspired with the plaintiff to cheat the defendants. In fact no one from the plaintiff who allegedly conspired with the third party had been named by the defendants. No evidence as well was tendered to prove that investigations for fraud or other wrongful conduct of the third
D party were being carried out despite it being pleaded in the defendants' defence.

[45] Goods were sold by the plaintiff and purchased by the defendants. Services were rendered by the plaintiff. The fact that the project by the defendants did not take off, indeed that the
E project failed, does not mean that the third party had conspired to cheat the defendants or that he did whatever he did without the knowledge and authority of the defendants.

Conclusion

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[46] In the result, the claim by the defendants against the third party was dismissed with costs of RM30,000.

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